83-110

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No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

VIVIAN WILLIAMS ET AL.,
PETITIONERS,

v.

SHAWN LADNER ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE STATE OF MAINE.

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QUESTION PRESENTED FOR REVIEW

WHETHER THE MAINE WORKER'S COMPENSATION STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT IT REQUIRES A DECEDENT'S NATURAL MINOR CHILDREN NOT LIVING WITH HIM AT HIS DEATH TO PROVE ACTUAL DEPENDENCY IN ORDER TO RECEIVE SURVIVOR'S BENEFITS, WHILE CHILDREN WHO LIVE WITH THE DECEDENT, EVEN IF STEPCHILDREN, ADOPTED CHILDREN, OR UNACKNOWLEDGED ILLEGITIMATE CHILDREN NEED NOT PROVE DEPENDENCY, AS THEY ARE CONCLUSIVELY PRESUMED TO BE DEPENDENT UPON THE DECEDENT.

PARTIES

Vivian Williams, Petitioner, is the former wife of the decedent, Earl Ladner, whose death on June 1, 1979 gave rise to the claims for survivors benefits by his children.

Corinna Ladner, Darci Ladner and Bryan Ladner, Petitioners, are the minor children of Viviam Williams and Earl Ladner by his first marriage.

Shawn Ladner, Respondent, is the widow of Earl Ladner.

Mason Mitchell Trucking Company was the employer of Earl Ladner at his death.

The St. Paul Insurance Company is the insurance carrier for Mason Mitchell Trucking Company.

The Worker's Compensation Commission for the State of Maine is a State Agency, and Respondent Herein.

TABLE OF AUTHORITIES CITED

CASES

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CONSTITUTIONAL PROVISION

The First Clause of the Fourteenth Amendment of the Constitution of the United States 7

STATUTE INVOLVED

Title 39, Maine Revised Statutes Annotated Chapter 1, Sub. 1, Section 2 Sub. 4 (C) (Hereafter 39 M.S.R.A. § 2) 11, 15

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OPINION BELOW

The opinion of the Supreme Judicial Court of Maine is reported in Shawn Ladner V. Mason Mitchell Trucking Company and St. Paul Insurance Company : Vivian Williams et al v. Mason Mitchell Trucking Company and St. Paul Insurance Company, at 434 A2d 37, and appears in the Appendix hereto. The timely petition for rehearing was denied on April 22, 1983, and not reported: a copy of the denial appears in the Appendix. The Case Docket is also transcribed therein.

The Worker's Compensation Commission records are not reported, and will be certified and transmitted if required.

JURISDICTION

The Judgment of the Supreme Judicial Court of Maine (Appendix, infra p. 1a) was entered on August 24, 1981. A timely petition for rehearing was denied on April 22, 1983. (App., infra p. 16a) The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1257 (3). This petition has been filed within 90 days of the denial as required under 28 U.S.C. 2101 (c).

CONSTITUTIONAL PROVISION

AMENDMENT XIV, CLAUSE 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

39 M.R.S.A § 2

Reprinted in Appendix

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States: Vivian Williams, et al, Petitioners herein pray that a writ of Certiorari issue to review the judgment of the Supreme Judicial Court for the State of Maine entered in the above entitled case on April 22, 1983.

STATEMENT OF THE CASE

Earl Ladner, Jr., herein the decedent, died in a compensable accident on June 1, 1979. He was survived by his former wife, Vivian Williams, his three minor children from that marriage, Corinna Ladner, Darcy Ladner and Bryan ladner, and his widow, Shawn Ladner. On July 1, 1979 Shawn Ladner applied for survivor's benefits, and on January 11, 1980, Vivan Williams applied for survivors benefits on behalf of the minor children. On October 20, 1980 the Worker's Compensation Commission awarded a 25% share of the survivor's benefits to Shawn Ladner and each of the three children.

Shawn Ladner appealed the decision of the Commission, which was affirmed by pro forma decree of the Superior Court. The Supreme Judicial Court of Maine heard the case, and on August 24, 1981 vacated the Commission's findings as being based

on an error of law, and remanded for further proceedings not inconsistent with their opinion. It should be noted that the Supreme Judicial Court did not state that a finding of dependency could not be made from the facts, only that the finding could not be based upon a specific single fact, specifically that it could not be based solely upon the fact that the decedent had an outstanding order of support, which he had completely defaulted upon. The Federal question of equal protection was mentioned in the brief for Vivian Williams, and addressed in oral argument, but not passed upon by the Maine Supreme Judicial Court.

Upon remand the Commission awarded the entire survivor's benefit to Shawn Ladner on Fabruary 9, 1982.

A timely motion for rehearing was denied by the Maine Supreme Judicial Court on April 22, 1983.

REASONS FOR GRANTING THE WRIT

1. Petitioners are denied the equal protection of the laws in that Petitioners must prove actual dependency while others to whom the decedent owed a lesser duty of support were given a conclusive statutory presumption of dependency.

39 M.R.S.A. § 2 creates classes of persons who may take survivors benefits. (Appendix, infra p. 17a) "Dependents" is defined simply as members of the employee's family or next of kin who are wholly or partly dependent upon him for support at the time of his injury. This broad language is consistent with the specific legislative purpose behind all Worker's Compensation schemes: to provide compensation for loss of earning capacity. Ladner v. Mason Mitchell Trucking Company, 434 A. 2d 37 (Appendix, infra p. 7a)

However, it is also well established that the statute is remedial in nature and is to be so construed as to accomplish its beneficent purposes and avoid incongruous or harsh results. Clark v. DeCoster Egg Farms, 421 A.2d 939 (1980)

Children should not be denied survivors benefits because a court decrees that one parent should have custody rather than another and that the deceased worker shirked his legal and moral responsibilities, thus forcing his children to live on the public dole.

Children, after all, have little or no say in who gains custody of them. It is still true that most often mothers are awarded custody rather than fathers, and that males die in work related accidents far more often than females. Thus while the statute is sex neutral on its face, it visits a disproportionate impact on children whose custody and residence is

with their mother.

To apply the reasoning of Weber v. Aetna Casualty & Surety Company, 406 U.S. 164 (1972) to the instant case, imposing disabilities on a child solely because of with whom he or she resides is contrary to the basic concept of our system that legal burdens should bear some relationship to some individual responsibility or wrongdoing.

This Court has gone far to protect the rights of children disadvantaged by illegitimacy, and justly so. Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guarantee & Liability Insurance Co. 391 U.S. 73 (1968); Weber, supra. In the instant case, this Honorable Court should not deny deprived legitimate children the same protection solely because their mother rather than decedent had custody of them.

The instant case presents a situation which is capable of repetition on a

national scale and condemns those innocent children, who already suffer the economic and emotional trauma of divorce, to suffer the loss of hope of future economic contribution from their father which the law says is their birthright, without compensation.

2. The Maine statutory scheme granting conclusive presumptions of dependency to some classes of survivors and requiring proof of dependency for other classes of survivors is arbitrary and capricious.

The Maine statutory scheme gives conclusive presumptions of dependency to surviving spouses, children, stepchildren, posthumous children, and adopted children who were living with decedent at the time of his death, regardless of actual need. In fact, Maine recognizes the statutory and common law duty to support a spouse living apart for justifiable cause by

giving the conclusive presumption of dependency to a surviving spouse who produces a judicial decree of living apart for justifiable cause. 39 M.R.S.A. 2

Yet, a decedent's natural children, even if destitute according to Maine law regarding eligibility for A.F.D.C. benefits (19 M.R.S.A. §481), who were not living with the decedent, but with his former wife, must prove that they have received actual support or have what the Worker's Compensation Commission believes is a reasonable expectation of such aid in the future, even though such children are destitute due to the decedent's failure to pay a valid judicial decree of child support. Under the Maine statutory scheme the more egregious a decedent's failure to support his natural children not living with him, the more destitute he renders them while living, the less likely the surviving children will be ab-

le to prove actual dependency in order to share in survivors benefits.

The arbitrary and capricious nature of the classification which offends the Equal Protection Clause can be demonstrated by a simple hypothetical case:

> The now-divorced spouses gave birth during the marriage to identical twin girls. Each spouse is awarded custody of one twin. The father fails to provide any support for the child in the mother's custody, in violation of a valid court order, leaving his ex-spouse and child destitute while he and his twin live a comfortable life.
>
> The father dies in a worker's Compensation covered accident. The twin living with the decedent is presumed dependent, while the other twin sister who decedent wrongfully refused to support will be unable to prove actual dependency and would thus be precluded from sharing in the survivors benefits.

In Frontiero v. Richardson, 411 U.S. 677 (1973) the Court rejected a statutory classification where persons similarly situated, male and female Air Force Officers, were subject to different requirments

in application for increased quarters a. lowances for their spouses.

> ...by ignoring the individual qualifications of particular applicants, the challenged statute provided " dissimilar treatment for men and women who are ... similarly situated.

The Court therefore held that, even though the state's interest in achieving administrative efficiency is not without "some legitimacy", to give a mandatory preference to members of either sex over members of the other merely to accomplish the elimination of hearings on the merits is to make the very kind of arbitrary legislative choice forbidden by the Constitution. Frontiero, at 682 .

Again, although the Maine statute is sexually neutral on its face, it definitely places a greater burden on custodial parents, which are predominantly women, without any rational relationship to actual need.

CONCLUSION

This Court stands as an ever watchful sentinel for "EQUAL JUSTICE UNDER THE LAW." , with a special determination to protect the weak and disenfranchised. Your petitioners are such people. They represent a significant number of persons similarly situated throughout the Nation, The ultimate purpose of all worker's compensation survivor's benefit plans is to provide some measure of compensation to those in need and to whom a duty of support was owed.

For these reasons a writ of Certiorari should issue to review the judgment and opinion of the Supreme Judicial Court of Maine.

Respectfully Submitted
by Petitioners' Counsel,

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Appendix.

SUPREME JUDICIAL COURT OF MAINE

(Argued May 6, 1981 Decided March 23, 1982)

SHAWN LADNER
Petitioner-Appellant

v.

MASON MITCHELL TRUCKING CO.
and St. Paul Insurance Companv.
Respondents-Appellees

VIVIAN WILLIAMS et al.
Petitioners-Appellants

v.

MASON MITCHELL TRUCKING CO.
and St. Paul Insurance Company.
Respondents-Appellees

Before.
WERNICK, GODFREY, ROBERTS
and CARTER, JJ.

JAMES P. DUNLEAVY, Presque Isle, Maine
for Williams et al., Petitioners-Appellants.

PATRICK E. JOYCE, Livermore Falls, Maine
for Shawn Ladner, Petitioner-Appellant.

LYDIA ROMER, Presque Isle, Maine
for Williams et al., Petitioners-Appellants.

WARREN E. WINSLOW, JR., Augusta, Maine
for Mason Mitchell Trucking Co. and St.Paul Insurance Company, Respondents-Appellees.

CARTER, Justice.

Following the work-related death in 1979 of the employee, Earl Ladner, Jr., the Workers' Compensation Commission determined that the following were entitled to death benefits (pursuant to 39 M.R.S.A. § 58): (1) Shawn Ladner, the employee's widow; and (2) Corinna Ladner, Darci Ladner, and Bryan Ladner, the employee's three minor children from the previous marriage of the employee and Vivian Williams. The Commission awarded equal shares (25%) of the death benefits to each of these four dependents. From a pro forma decree affirming

the Commission's decision, Shawn Ladner appeals, and the children cross-appeal. We sustain the appeal, deny the cross-appeal, and remand for further proceedings before the Commission.

The issues before us are the following: (1) Is proof of emotional or psychological dependence of a child upon the deceased employee sufficient to make the child a "dependent" of the employee as defined in 39 M.R.S.A. § 2(4)?[1] (2) Is proof of the employee's bare legal obligation to pay child support for his minor children sufficient to make the children "dependents" as defined in 39 M.R.S.A. § 2(4)? (3) Did the Commissioner err by excluding evidence at the hearing of the widow's means of support after the employee's death?

The employee married Vivian Williams in 1969; they were divorced on May 31, 1977. Custody of their three minor children, Corinna, Darci, and Bryan, was awarded to Vivian,

and the employee was ordered by the District Court to pay $10 per week per child, plus medical, dental and optometrical expenses, as child support. No payments were ever made to Vivian. Vivian applied for Aid to Families with Dependent Children (AFDC) sometime in 1977, assigning to the Department of Human Services her right to child support pursuant to 19 M.R.S.A. § 512. Vivian received $275 per month plus medical and dental expenses ($1,000 in 1977) in AFDC benefits up to the time of the employee's death (June 1, 1979).

After the divorce, the employee visited his children, and occasionally gave them clothes and gifts. The evidence supports the Commission's factual finding that the employee's total direct contributions amounted to less than $50 per child per year following the divorce.

On March 31, 1978, the employee married Shawn Ladner, with whom he lived up until the time of his death.

The Commissioner ruled that the widow

was entitled to the conclusive presumption of total dependency found in 39 M.R.S.A. § 2(4)(A). The Commissioner rejected the children's "emotionally dependent" argument. He found that the employee's gifts to the children were insufficient to establish that any of the children were actually dependent upon the employee's earnings. However, the Commissioner found that the children were actually dependent upon the employee because of the employee's legal obligation to support them notwithstanding the employee's failure to satisfy that obligation. Therefore, the children were entitled to be conclusively presumed wholly dependent under 39 M.R.S.A. § 2(4)(C).

[1] The widow moved for specific findings of fact and conclusions of law pursuant to 39 M.R.S.A. § 99. The Commissioner responded by repeating his original decree.[2] Therefore, rather than assume that the Commissioner made certain factual findings or applied certain legal standards, we must apply "stricter ap-

pellate review" and review only "the factual findings actually made and the legal standards actually applied." Gallant v. Boise Cascade Paper Group, Me., 427 A.2d 976,977 (1981).

I.

Death benefits are payable to "dependents of the employee, dependent upon his earnings for support at the time of his injury...." 39 M.R.S.A. § 58. "Dependents" is defined as "members of an employee's family or next of kin who are wholly or partly dependent upon the earnings of the employee for support at the time of the injury." 39 M.R.S.A. § 2(4). Section 2(4) further provides that a child not living with the employee but who is "actually dependent in any way [upon the employee] at the time of the injury" shall be "conclusively presumed to be wholly dependent for support upon a deceased employee." (Emphasis added.)

The children argue that proof of emotional or psychological dependence is sufficient to prove that a child is "actually dependent

in any way." The Commissioner properly rejected that argument.

[2] The basic purpose of the Workers' Compensation Act is to provide compensation for loss of earning capacity; "'[i]n compensation, unlike tort, the only injuries compensated for are those which produce disability and thereby presumably affect earning power.'" Cook v. Colby College, 155 Me. 306, 310, 154 A.2d 169, 171 (1959), quoting A. Larson, Workmen's Compensation § 2.40. Both section 58 and section 2(4) speak of dependency upon the employee's earnings for support at the time of the injury.

[3] A fundamental precept of statutory construction is that to discover a statute's intendment one must look to the Legislature's intent. Schwanda v. Bonney, Me., 418 A.2d 163, 165-55 (1980). To ascertain the Legislature's intent, one must consider all parts of the statute in question. Reggep v. Lunder Shoe Products Co., Me., 241 A.2d 802, 805 (1968). In light of the purpose of the Act and the spe-

cific references to dependency upon earnings, we cannot interpret "dependent in any way" so broadly as to encompass emotional or psychological dependency.

II.

[4] The Commission found that the employee's direct contributions of under $50 per child per year after the divorce were "insufficient to establish that any one of the three minor [children] were dependent in fact upon the earnings of the deceased employee." We have held that "[t]he mere reception of assistance in the form of contributions . . . does not of itself create dependency. The controllong test is, was the assistance relied upon by the claimant for his or her reasonable means of support and suitable to his or her position in life." Drouin v. Ellis C. Snodgrass Co., 138 Me. 145, 149, 23 A.2d 631, 633 (1941). The claimant's burden of proving actual dependency in any way was not sustained in Drouin "by evidence which merely showed that the de-

ceased employee had made small annual contributions in the form of gifts in or near the holiday season to his daughter through her grandmother and for a time had defrayed her expenses in a convent." Id. at 149, 23 A.2d at 633. Thus, there was competent evidence to support the similar finding in the instant case.

[5] The Commissioner went on to find that the record suggests that the employee defaulted on all his divorce judgment obligations. He stated that:

> Although many jurisdictions have held that the mere existence of a legal obligation to support minor children will not of itself satisfy the workers' compensation dependency requirements it is illogical to think that benefits of the Workers' Compensation Act were intended to be withheld from dependents of an injured worker who simply refused to support them.
>
> . . . . .
>
> Given the evidence with respect to the legal obligation to support these three minor claimants imposed by our courts upon the deceased employee, notwithstanding his failure to satisfy those obligations, the Commission finds as a matter of law

> that the dependency status of the three minor claimants was not destroyed by the deceased employee's illegal conduct.

Here, the Commissioner applied an improper legal standard. We have recently reaffirmed that dependency under the Act requires, in addition to a duty to support, "'some evidence of a reasonable probability and expectation that the obligation . . . will be fulfilled and thereby have some real as well as mere theoretical value.'" Lavoie v. International Paper Co., Me., 403 A.2d 1186, 1190 (1979), quoting Drouin, 138 Me. at 150, 23 A.2d at 633. Since the purpose of death benefits is to compensate dependents for their economic loss resulting from the employee's death, if there was no reasonable expectation or probability that the employee would have in fact fulfilled his legal obligations to the claimants, then the claimants suffered no economic loss from the employee's death and are not entitled to death benefits. See Thomas v. Industrial Commission of Arizona, 87 Ariz. 238, 350 P.2d

392 (1960); C. W. Wright Construction Co. v. Brannan, 217 Md. 397, 142 A.2d 574 (1958).

[6[Of course, the absence of past actual payments by the employee is not determinative of the question of expectation or probability of future payments. It is merely one factor to be considered, along with such factors as the reasons for the employee's failure to pay, the diligence of the claimant in pursuing the obligation, and the relationship between the employee and the claimant. See, e. g., id.; Kosmicki v. Aspen Drilling Co., 76 N.M. 234, 414 P.2d 214 (1966).

We do not hold that on this record the Commissioner could not find a reasonable probability and expectation that the employee would have fulfilled his obligation in the future. We hold only that the Commissioner was in error in his specific conclusion of law that the employee's legal obligation to support the minor children is alone sufficient to make the children "dependents" enti-

tled to death benefits. We remand to the Commissioner in order that he may apply the proper legal standard.

III.

At the February 1980 hearing, the Commissioner did not allow questions to be asked of the widow concerning her sources of income and her ability to support herself.

[7] The children argue that answers to those questions would have been relevant to show whether the widow had become a "dependent of another person." Section 58 provides in part that:

> If the dependent of the employee to whom compensation will be payable upon his death is the widow of such employee, upon her death or at the time she becomes a dependent of another person, conpensation to her shall cease and the compensation to which she would have been entitled thereafter, but for such death or depend ency, shall be paid to the child or children, if any, of the deceased employee, . . . who are dependent upon the widow at the time of her death or dependency.[3]

"Dependent of another person" is defined at 39 M.R.S.A. § 2(10) as follows:

> For purposes of the payment or the termination of compensation pursuant to sec-

> tion 58, a widow or widower of a deceased employee shall be the dependent of another person when over half of his or her support during a calendar year was provided by the other person.

Finally, 39 M.R.S.A. § 2(4) provides that a wife is conclusively presumed to be wholly dependent for support upon a husband with whom she lives.

[8] Construing these sections together, we find that evidence of the widow's means of support before the employee's death was not relevant in light of the conclusive presumption of total dependence which arose upon proof that the widow was living with the employee. A conclusive presumption is not really a presumption at all. It is a rule of law. The nonexistence of the fact "presumed" is immaterial. Albee's Case, 128 Me. 126, 128, 145 A. 742, 742, 743 (1929).

[9] We also conclude that evidence of the widow's ability to support herself after the employee's death was not relevant. A widow does not become the dependent of another per-

son when she becomes dependent upon herself. Section 2(10) was enacted and section 58 amended by P.L. 1975, ch. 701, a comprehensive act intended to conform Maine law to the Fourteenth Amendment of the United States Constitution and to Title VII of the United States Civil Rights Act of 1964 by removing gender distinctions. Section 58 previously provided that death benefits to a dependent widow would cease upon her death or remarriage, while death benefits to a dependent widower would cease upon his death. Chapter 701 replaced "remarriage" with "at the time she becomes a dependent of another person," and added the same condition to a widower's eligibility. It is clear that prior to the enactment of chapter 701, death benefits payable to a widow or widower would have continued, in the absence of remarriage, regardless of mere self-sufficiency. We do not believe that the Legislature intended to change that result when it enacted chapter 701.

The entry is:

Judgment vacated.

Remanded to the Workers' Compensation Commission for further proceedings consistent with the opinion herein.

Further ordered that each party to this appeal should bear its own counsel fees incurred in the appeal.

All concurring.

FOOTNOTES

1. In pertinent part, 39 M.R.S.A. § 2(4) states:

4. Dependents. "Dependents" shall mean members of an employee's family or next of kin who are wholly or partly dependent upon the earnings of the employee for support at the time of the injury. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

. . . . .

C. A child or children, including adopted and stepchildren, under the age of 18 years, or under the age of 23 years if a student, or over the age of 18 years but physically or mentally incapacitated from earning, upon the parent with whom he is or they are living, or upon whom he is or they are actually dependent in any way at the time of the injury to said parent, there being no surviving dependent parent, "child" shall include any posthumous child whose mother is not living and dependent. In case there is more than one child dependent, the compensation shall be divided equally among them.

2. The parties do not raise any issue on appeal as to the propriety of the Commissioner's response. We therefore do not decide whether the Commission fulfilled its statutory obligation to make findings of fact and conclusions of law upon request. See Gallant v. Boise Cascade Paper Group, Me., 427 A.2d 976, 977 (1981).

3. The children contend that if the widow had become the dependent of another person, then they would be entitled to her share of the death benefits. Clearly they would not be so entitled under the specific provisions of section 58; the children have never been dependent upon the widow (Shawn Ladner). We intimate no opinion as to whether the children, assuming her to have become the dependent of another person.

STATE OF MAINE — SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. WCC-83-73

SHAWN LADNER]
]
vs.]
]
MASON MITCHELL TRUCKING, et al.]
]
VIVIAN WILLIAMS , et al.] ORDER
]
vs.]
]
MASON MITCHELL TRUCKING, et al.]

Upon motion of appellants for reconsideration,

It is ORDERED that the motion be and hereby is DENIED.

Dated this twenty-second day of April, 1983.

For the Court,

/s/ Edward Godfrey
Associate Justice

McKusick, C.J. did not participate.

Title 39 M.R.S.A. § 2(4) (1978) states in pertinent part as follows:

4. Dependents. "Dependents" shall mean members of an employee's family or next of kin who are wholly or partly dependent upon the earnings of the employee for support at the time of the injury. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

A. A wife upon a husband with whom she lives, or from whom she is living apart for a justifiable cause or because he has deserted her, or upon whom she is actually dependent in any way at the time of the injury. A wife living apart from her husband shall produce court order or other competent evidence as to separation and actual dependency.

B. A husband upon a wife with whom he lives, or upon whom he is actually dependent in any way at the time of the injury.

C. A child or children, including adopted and stepchildren, under the age of 18 years, or under the age of 23 years if a student, or over the age of 18 years but physically or mentally incapacitated from earning, upon the parent with whom he is or they are living, or upon whom he is or they are actually dependent in any way at the time of the injury to said parent, there being no surviving dependent parent, "child" shall include any posthumous child whose mother is not living and dependent. In case there is more than one child dependent, the compensation shall be divided equally among them.

. . . . .

In all other cases questions of total or partial dependency shall be determined in accordance with the fact, as the fact may have been at the time of the injury. If there is more than one person wholly de-

pendent, the compensation shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof during the period in which compensation is paid to persons wholly dependent. If there is not one wholly dependent and more than one person partly dependent, the compensation shall be divided among according to the relative extent of their dependency. If a dependent is an alien residing outside of the United States or of the Dominion of Canada, the compensation paid to any such dependent shall be 1/2 that provided in case of the death of an employee.

39 M.R.S.A. § 2(4) (1978).

Title 39 M.R.S.A. § 58 (1978) states in pertinent part as follows:

If death results from the injury, the employer shall pay the dependents of the employee, dependent upon his earnings for support at the time of his injury, a weekly payment equal to 2/3 his average gross weekly wages, earnings or salary, but not more than the average weekly wage in the State of Maine as computed by the Employment Security Commission; 133 1/3% of such average weekly wage as of July 1, 1977; 166 2/3% of such average weekly wage as of July 1, 1979; and 200% of such average weekly wage as of July 1, 1981; nor less than $25 weekly; from date of death, until such time as provided for in the following paragraph. Such weekly compensation shall be adjusted annually on July 1st so that it continues to bear the same percentage relationship to the average weekly wage in the State of Maine as computed by the Employment Security Commission as it did at the time of the injury.

If the dependent of the employee to whom compensation will be payable upon his death is the widow of such employee, upon her death or at the time she becomes a dependent of another person, compensation to her shall cease and the compensaiton to which she would have been entitled thereafter, but for such death or dependency, shall be paid to the child or children, if any, of the deceased employee, including adopted and stepchildren, under the age of 18 years, or over that age but physically or mentally incapacitated from earning, who are dependent upon the widow at the time of her death or dependency. If the dependent is the widower, upon his death or at the time he becomes a dependent of another person, the remainder of the compensation which would otherwise have been payable to him shall be payable to him shall be payable to the children above specified, if any, who at the time thereof are dependent upon

him. In case there is more than one child thus dependent, the compensation shall be divided equally among them. Except in the case of dependents who are physically or mentally incapacitated from earning, compensation payable to any dependent child under the age of 18 years shall cease upon such child's reaching the age of 18 years or upon marriange.

If the employee leaves dependents only partly dependent upon his earnings for support at the time of his injury, the employer shall pay such dependents a weekly compensation equal to the same proportion of the weekly payments provided in this section for the benefit of persons dependent, as the total amount contributed by the employee to such partial dependents for their support during the year prior to his injury, bears to the earnings of the employee during said period.

39 M.R.S.A. § 58 (1978).

SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

DOCKET NO WCC-83-73

COUNTY_____from WORKERS' COMPENSATION COMMISSION

ON APPEAL BY Petitioners

Shawn Ladner v. Mason Mitchell Trucking Company, et al.

Vivian Williams, et al. vs. Mason Mitchell Trucking Company, et al.

Mar. 2, 1983	Attested copy of the appellate Division decision of the Workers' Compensation Commission filed March 1, 1983.
Mar. 21, 1983	Petition for appellate review filed.
Mar. 23, 1983	Answer to petition for appellate review filed by Respondent Shawn Ladner.
Mar. 29, 1983	Letter filed by Warren I.

Winslow, Jr., Esq. adopting Attorney Joyce's answer to the petition for appellate review on behalf of Mason Mitchell Trucking and St. Paul Insurance Company.

Apr. 1, 1983 Order denying petition filed. (Godfrey, J.) Upon consideration by all the Justices of the Law Court, the petition for appellate review of the decision of the Appellate Division of the Workers' Compensation Commission in this matter is denied. It is ordered that the employer pay to the employee an allowance for counsel fees and expenses in the amount of $75.00. Copies to counsel and Clerk of the Appellate Division.

Apr. 15, 1983 Motion for rehearing and reconsideration filed by appellants. Motion to suspend the rules and for enlargement of time for issuance the mandate of the Law Court filed by the appellants.

Apr. 22, 1983 Order filed. (Godfrey, J.) Motion of appellants for reconsideration is denied. Copies to counsel and to JJ.

A true copy, attested & Certified:

/s/ James Chute
Clerk

Office-Supreme Court, U.S.
FILED
AUG 19 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983.

No. 83-110

VIVIAN WILLIAMS, ET AL,

Petitioners

v.

SHAWN LADNER, ET AL,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

MEMORANDUM OPPOSING CERTIORARI

EDWARD H. CLOUTIER, ESQ.
COUNSEL OF RECORD
CLOUTIER, JOYCE, DUMAS & DAVID
3 Church Street, P.O. Box E
Livermore Falls, Maine 04254
Attorney for Respondent,
Shawn Ladner
(207) 897-3911

Of Counsel:
PATRICK E. JOYCE, ESQ.

MEMORANDUM OF SHAWN LADNER
OPPOSING CERTIORARI

Respondent Shawn Ladner represents to the Court as follows:

1. The decision of the Maine Supreme Judicial Court of which review is sought by Petitioners, which is reported as Ladner v. Mason Mitchell Trucking Co., 434 A.2d 37 (Me. 1981), was decided on August 24, 1981. The Petition was filed on July 21, 1983, more than 90 days since the entry of judgment by the Maine Supreme Judicial Court, and the period for applying for a writ of certiorari was not extended by a Justice of the Court pursuant to 28 U.S.C. §2101(c) or Rule 22 of this Court. Therefore, time has lapsed for the Petitioner's application for a writ of certiorari.

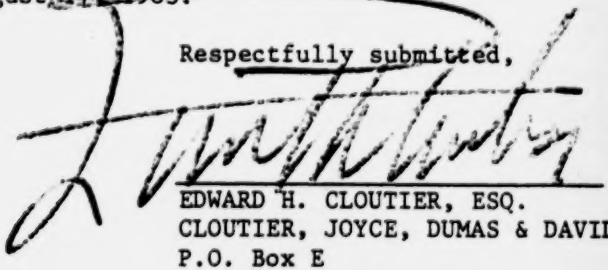
2. The Petitioner presents a constitutional issue that was never raised in the lower court nor passed upon by the lower court. Tyrrell v. District of Columbia, 243 US 1 (1916).

3. The deceased employee did not have children living with him at the time of his death and therefore the facts of record in the court below will not support a determination of the question presented in the Petition.

Therefore, the petition for writ of certiorari should be denied.

Dated: August 17, 1983.

Respectfully submitted,



EDWARD H. CLOUTIER, ESQ.
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Attorney for Respondent
Shawn Ladner

PATRICK E. JOYCE, ESQ.
of counsel

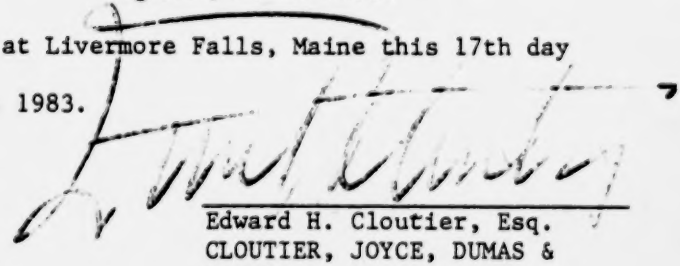
CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Rules of this Court, the undersigned, counsel of record for Respondent Shawn Ladner, did deposit today in the United States Mail in Livermore Falls, Maine, first class postage prepaid, three copies of the above "Memorandum Opposing Certiorari" for, and addressed to, counsel for each of the parties as follows:

David F. Gould, Esquire
154 State Street
P.O. Box 33
Presque Isle, Maine 04769

Michael D. Seitzinger, Esquire
Pierce, Atwood, Scribner, Allen,
Smith and Lancaster
77 Winthrop Street
Augusta, Maine 04330

Dated at Livermore Falls, Maine this 17th day of August, 1983.



Edward H. Cloutier, Esq.
CLOUTIER, JOYCE, DUMAS &
DAVID
P.O. Box E
Livermore Falls, Maine 04254

Attorney for Respondent
Shawn Ladner

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-110

VIVIAN WILLIAMS, ET AL.,
Petitioners

v.

SHAWN LADNER, ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

MEMORANDUM OPPOSING CERTIORARI

MICHAEL D. SEITZINGER, ESQ.
PIERCE, ATWOOD, SCRIBNER,
ALLEN, SMITH & LANCASTER
77 Winthrop Street
Augusta, Maine 04330
Attorney for Respondents
Mason Mitchell Trucking
Company and St. Paul
Insurance Company

WARREN E. WINSLOW, JR.
of Counsel

MEMORANDUM OF MASON MITCHELL TRUCKING COMPANY AND ST. PAUL INSURANCE COMPANY OPPOSING CERTIORARI

Respondents Mason Mitchell Trucking Company and St. Paul Insurance Company represent to the Court as follows:

1. The decision of the Maine Supreme Judicial Court of which review is sought by Petitoners, which is reported as Ladner v. Mason Mitchell Trucking Co., 434 A.2d 37 (Me. 1981), was decided on August 24, 1981. The Petition was filed on July 21, 1983, more than 90 days since the entry of judgment by the Maine Supreme Judicial Court, and the period for applying for a writ of certiorari was not extended by a Justice of this Court pursuant to 28 U.S.C. §2101(c) or Rule 22 of this Court. Therefore, the Petitioner's application for a writ of certiorari is out of time.

2. The constitutional issue presented in the Petition was never raised by Petitioners in the court below or passed upon by the court below.

3. The decedent had no children living with him at the time of his death and therefore the facts of record in the court below will not support a determination of the question presented in the Petition.

Therefore, the petition for writ of certiorari should be denied.

Dated: August 5, 1983.

Respectfully submitted,



MICHAEL D. SEITZINGER, ESQ.
PIERCE, ATWOOD, SCRIBNER,
ALLEN, SMITH & LANCASTER
77 Winthrop Street
Augusta, Maine 04330
Attorney for Respondents
Mason Mitchell Trucking
Company and St. Paul
Insurance Company

WARREN E. WINSLOW, JR.
of Counsel

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Rules of this Court, the undersigned, counsel of record for Respondents Mason Mitchell Trucking Company and the St. Paul Insurance Company, did deposit today in the United States Mail in Augusta, Maine, first class postage prepaid, three copies of the above "Memorandum Opposing Certiorari" for, and addressed to, counsel for each of the parties as follows:

David F. Gould, Esquire
154 State Street
P. O. Box 33
Presque Isle, Maine 04769

Patrick E. Joyce, Esquire
Cloutier, Joyce, Dumas
and David
3 Church Street
P. O. Box E
Livermore Falls, Maine 04254

Dated at Augusta, Maine this 5th day of August, 1983.

Michael D. Seitzinger, Esq.
PIERCE, ATWOOD, SCRIBNER,
ALLEN, SMITH & LANCASTER
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Augusta, Maine 04330

Attorney for Respondents
Mason Mitchell Trucking
Company and St. Paul
Insurance Company